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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. VICTOR E. SOTO, Defendant and Appellant.	B270095 (Los Angeles County Super. Ct. No.TA036418)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed as modified.

Derek Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Victor Edgar Soto was convicted of murder and attempted murder for a gang-related shooting that occurred in 1996. On appeal, he argues that the trial court erred in denying his post-trial request for discovery of officer personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). In addition, the parties agree that the trial court made several minor sentencing errors. We instruct the court to correct the sentencing errors, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Information

The Los Angeles County District Attorney (the People) filed an information charging defendant with the murder of Armando Flores (Pen. Code, § 187, subd. (a),[1] count 1), and attempted murder of David Velasquez (§§ 187, subd. (a), 664, count 2). The information further alleged that defendant personally used a firearm in the commission of both offenses (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)), and that defendant had a prior serious felony conviction (§§ 667, subd. (a)(1), 1170, subd. (h)(3)). In an allegation that became a point of confusion and is at issue on appeal, the information further alleged that the offenses were committed for the benefit of a criminal street gang "pursuant to Penal Code 186.22(b)(1)(4)," and if defendant were to be sentenced to prison for life, he "shall not be paroled until a minimum of 15 calendar years have been served, a serious felony

[1] All further unspecified statutory references are to the Penal Code.

pursuant to Penal Code section 186.22(b)(1)(4)."[2] Defendant pled not guilty. The case proceeded to a jury trial.

B. Prosecution case

1. *Incident*

At trial, Olga Flores testified that her brother Armando Flores was killed on August 26, 1996. Olga[3] and her family lived in an apartment complex in Compton. Armando was a member of the Largo gang, and was friends with David Velasquez. On the day of Armando's death, David and another friend, "Flaco," came to the apartment looking for Armando. Olga testified that Armando, David, and Flaco went outside to a nearby set of stairs.

Olga saw two men coming from the front of the apartment building toward her apartment and toward her brother. Both men were Hispanic; one was tall and chubby, and the other was shorter and thinner. The taller man had acne scars on his face and was wearing a blue shirt. The man in blue got close to Armando and asked where he was from.[4] Armando responded that he was from Largo. The man in blue said, "Colonial Watts," pulled a gun from his waistband, and pointed it at Armando's face. Armando picked up a rock from the ground and threw it at the man's face, and then ran. David and Flaco ran up the stairs,

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[2] As discussed further below, section 186.22 does not have a subdivision (b)(1)(4). It appears that the correct subdivision is (b)(5).

[3] Because multiple witnesses and the victim have the same or similar last names, we refer to several people herein by their first names for clarity.

[4] On cross-examination, Olga agreed that she told a detective that she could not hear what the men said to each other before the shooting. She testified that she heard the initial exchange, but did not hear anything after that.

and the shorter man remained in the courtyard holding a weapon. The man in blue ran after Armando toward a parking area in the rear of the complex. Olga heard "more than seven" gunshots. Olga ran after her brother and the man, and found Armando lying on the ground; the man in blue was gone.

Rosa Flores, Olga and Armando's sister, testified that she was at home on the day of Armando's death, and she also saw the two men. She noticed them because of the way they were dressed and because of their unusual behavior. Rosa said she did not remember much else from that day.

Maria Velazquez testified that in 1996 she was 14 years old and lived in the same apartment complex as the Flores family. On the day Armando was shot, she saw "more than seven men" come into the complex. Armando was near Maria, talking to her. One of the men pointed a gun at Armando and asked him if he was from a gang. Armando said no, swatted the gun away, and ran. The man with the gun ran after Armando and started shooting.

Geraldo Velazquez, Maria's older brother, testified that he was 16 at the time of the shooting. He was standing in the doorway of his family's apartment when he saw three men running through the apartment complex. The men ran from the street toward the back of the complex. Geraldo heard "a lot" of gunshots, then the men ran toward the street again.

Victim David Velasquez testified that he and Armando were members of Largo. On the day of the shooting, David was at the apartment complex, hanging out with Armando and Flaco and getting high.[5] He noticed a white van going by the

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[5] David did not remember Flaco's real name. Detective Aguirre testified that Flaco's name was Manuel Sanchez.

apartment complex. David said he heard gunshots and ran toward the back of the apartment complex; he did not see anything involving the shooting. David also said that he did not want to testify, and that he had been arrested and brought to court because he refused to comply with the court's subpoena.

The prosecution played a video recording of an interview with David from August 28, 1996, two days after the shooting.[6] In the interview, David said that several hours before the shooting, he had seen "Jap" from Colonial, who was married to David's cousin, Edith. Jap blamed David and Largo for shooting at him recently. Later the same day, David was with Armando and Flaco near Armando's apartment. He saw Jap's white van pass by the complex a couple of times. The van parked, and Jap walked up to David, Armando, and Flaco. Jap asked Armando where he was from, and Armando responded that he was from Largo. David said or did something (the interview transcript is unclear), then Jap shot at David and missed. Jap also shot at Flaco, and then started chasing Armando. David ran away and told a neighbor to call an ambulance. David saw the van leave. When officers asked about Jap's real name, David said he was not sure, but he thought it might be Victor Santos. David said his mother would know the name.

Armando died the day of the shooting. The medical examiner testified that Armando had five gunshot wound entries, including a fatal wound in which a projectile entered the back of Armando's head and traveled through his brain.

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[6] The video from the interview is not in the record on appeal. The following information is from the transcript included in the record as a trial exhibit.

2. *Investigation*

Los Angeles County Sheriff's Department (LASD) deputy Victor Locklin testified that he worked for the Compton Police Department in 1996. When Locklin talked to David at the scene, David said he was with Armando and Flaco when he saw a white van with two Colonial Watts members "mad dogging" them, or looking at them. David, Armando, and Flaco walked into the apartment complex, and then one of the people from the van walked into the complex from the other direction. The man asked where they were from, and Armando said, "Largo." The man yelled, "Colonial," pulled out a gun, and started shooting at them. David ran into an apartment, and Armando ran toward the rear of the complex. David heard additional gunshots coming from the rear of the complex. Locklin testified that David did not tell him the name of the shooter.

LASD deputy Eduardo Aguirre testified that he currently works as an investigator in the homicide bureau. When he was with the Compton Police Department in 1996, he was assigned to investigate Armando's murder. Aguirre interviewed David and recorded the interview. Based on David's statement that Jap's real name might be Victor Santos, Aguirre had a photographic six-pack prepared that included a photo of a man with a similar name. When Aguirre showed the six-pack to David and David's mother, neither identified any of the photos as showing Edith's husband.

After getting additional information from David's mother, including defendant's name, Aguirre created a six-pack that included defendant's photo in the number one position. Aguirre showed the six-pack to multiple witnesses in the case. Rosa, Maria, and Geraldo each immediately identified defendant.

Aguirre testified that David also chose defendant from the six-pack, and said he was the person who shot at him, Flaco, and Armando. David testified that the officer only asked him to identify his family member. David testified at trial that defendant was his cousin Edith's husband.[7]

Olga was also shown a six-pack photographic lineup, but at trial could did not recall whether she had identified anyone in 1996. At trial, however, Olga testified that defendant looked like the man who shot Armando. Olga testified that at a prior hearing defendant looked at her in a way that reminded her of the way the man in blue looked at her the day of the shooting. Defendant's walk also reminded her of the way the man who shot Armando walked.

Aguirre testified that Armando, David, and Flaco were members of the Compton Varrio Largo gang. In 1996, local gangs, including Largo, were feuding with Colonial Watts over Colonial Watts members' attempts to move into the area. Aguirre learned that David's cousin Edith was a member of Colonial Watts. Aguirre also testified that in his opinion, defendant was a member of Colonial Watts and his moniker was Jap. Aguirre testified that when gang names are exchanged before a shooting, as they were in this case, the shooting is done to benefit the gang of the shooter.

A warrant was issued for defendant's arrest, but attempts to locate him were unsuccessful. Defendant's driver's license expired in 1998 and his state identification expired in 2000; neither was renewed. Aguirre testified that when the Compton

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[7] On cross-examination, David said that Edith's husband and Jap are not the same person. On redirect, David said there are two different people called Jap.

Police Department merged with the Los Angeles County Sheriff's Department in 2000 or 2001, all pending Compton cases were transferred to someone else, and he no longer worked on those cases.

3. *Defendant's arrest*

Huntington Park police officer Marko Mendoza testified that he pulled defendant over as he was driving on October 2, 2014. Defendant told Mendoza his name was George Herrera. Mendoza arrested defendant for reasons that are not clear in the record,[8] and eventually defendant gave police his true name and date of birth. A search of defendant's name in the police database returned a possible warrant for murder issued in 1996. Live-scan fingerprints confirmed defendant's identity.

LASD deputy Steven Blagg testified that he was assigned to the case after defendant was arrested. Blagg confirmed that the man arrested was the same person for whom a warrant was issued in 1996. He gathered materials from the old case file, including photos from the crime scene, physical evidence, and the videotaped interview of David.

Blagg testified that he spoke with Olga Flores, and showed her the six-pack with defendant's photograph in it. Olga said the person in position number six looked familiar. As she looked at the six-pack, her eyes kept going back to the person in position number one. Blagg's partner, Fred Reynolds, asked Olga why she kept looking at the photograph in position number one. Olga said the person in position number one also looked familiar. She did not say that either the person in position one or six was the shooter.

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[8] The parties stipulated that there was probable cause to arrest defendant.

LASD deputy Timothy Cho testified that he works as a custody investigator at the North County Correctional Facility, where defendant was housed after his arrest. Blagg requested a property search of defendant's possessions. Defendant was in possession of three styrofoam cups with graffiti-type writing on them; photos of the cups were shown to the jury. Aguirre testified that the markings on the cups were Colonial Watts gang symbols or tags. Defendant also had a seven-page letter addressed to him from an inmate at North Kern State Prison. The letter was addressed to "Jap," and the letter had the words "Watts up" twice on the first page. Aguirre testified that "Jap" was a gang moniker, and "Watts" was a gang tag used to identify and represent the gang. The letter was from Victor Alarcon, who has Colonial Watts tattoos.

C. Defense case

The defense called a single witness, psychologist Mitchell Eisen, Ph.D. He testified generally about memory and how memories may change over time. He testified that pieces of old memories are replaced by reconstructed data that may not be correct. Eisen said life-threatening trauma can influence memory. He also testified that suggestions to a witness looking at a six-pack photographic lineup could influence the witness's identification of a person involved in an incident.

D. Verdict, post-trial motions, and sentence

The jury found defendant guilty on both counts, and found the firearm allegations and gang allegations to be true as to both counts. The jury found the attempted murder of David to be willful, deliberate, and premeditated (count 2). Defendant waived a jury trial as to the prior allegations.

Defendant chose to represent himself for purposes of filing post-trial motions. Defendant filed nine post-trial motions, including various requests for post-trial discovery, assignment of an investigator, funding for an investigation, juror contact information, trial transcripts, and appointment of an expert witness, as well as a motion for a new trial. The only motion relevant for purposes of appeal is defendant's post-trial *Pitchess* motion, in which defendant sought the personnel files of Aguirre, Blagg, and Reynolds. We discuss the motion in further detail below, but in short, defendant argued that the records were required to show that Aguirre "lied and falsified police reports", and that Blagg and Reynolds collaborated to guide Olga into choosing defendant from the six-pack photo lineup. Defendant also asserted that Blagg improperly ordered belongings confiscated from defendant's housing unit, including the foam cups and letter.

The Los Angeles County Sheriff's Department opposed defendant's motion. The Sheriff's Department asserted that defendant was not entitled to post-judgment discovery, and defendant's motion failed to satisfy the requirements for discovery of confidential peace officer records. The opposition also noted that the Penal Code does not require that peace officer records be maintained for more than five years, and because parts of defendant's request related to the investigation in 1996, such records were not available.

The trial court found that although defendant was entitled to discovery relevant to his motion for new trial, he failed to show good cause warranting in-camera review of the records. The court therefore denied the motion.

The court denied defendant's motion for a new trial. The court held a trial regarding defendant's prior conviction, and found the prior allegation to be true. The court granted the People's motion to amend the information to include an allegation pursuant to the Three Strikes law (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)), and denied defendant's *Romero* motion.[9]

The court sentenced defendant to 100 years to life, calculated as follows. On count 1 (murder) , the court sentenced defendant to 25 years to life, doubled pursuant to the Three Strikes law, with a consecutive term of ten years pursuant to section 12022.5, for a total of 60 years to life. On count 2 (attempted murder), the court sentenced defendant to 15 years to life, doubled pursuant to the Three Strikes law, with a consecutive term of ten years pursuant to section 12022.5, for a total of 40 years to life, to run consecutive to count 1. The court stayed sentencing on the gang enhancements.

Defendant timely appealed.

DISCUSSION

A. *Pitchess* motion

Defendant asserts that the trial court abused its discretion in denying his post-trial *Pitchess* motion. "A motion for discovery of peace officer personnel records is addressed to the sound discretion of the trial court, reviewable for abuse." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

1. *Motion*

Defendant sought the personnel records of Aguirre, Reynolds, and Blagg "relating to acts of misconduct concerning these officers' characters for honesty and integrity, including (but not limited to) accusations of lying, filing any false reports,

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[9] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

perjury, fabricating addmissions [*sic*], theft, confessions, or other evidence, evidence tampering, fraud, misrepresentation, illegal cover-ups, malfeasance."

Defendant explained that he "intends to show that . . . Aguirre lied and falsified police reports." In a declaration attached to the motion, defendant compared parts of Aguirre's report of his interview with David to the transcript of Aguirre's interview with David, noting minor discrepancies. For example, defendant stated, "Officer Aguirre ask[ed] David if he knows Japs [*sic*] first name, wich [*sic*] to David on lines 6-7 states he doesn't know. On line 14 it is Ofcr. Aguirre who mentions a last name of Santos to David."[10] The report states, "[David] stated that he believes 'Jap's' last name is Santos." The transcript of the interview indicates that Aguirre asked David about Jap's last name, and asked, "Santos or (Inaudible)?" David responded, "Santos."

Defendant also asserted that "the collective collaboration of . . . Reynolds and . . . Blagg" influenced witness identifications. He argued that Blagg and Reynolds interviewed Norma Flores, Olga and Armando's sister, and during the interview with Norma, "Det. Blagg . . . begins leading Norma Flores to position #1 photo of six pack, wich [*sic*] is that of the defendant Victor E. Soto." Three pages of a transcript are attached, in which Blagg (spelled Blag in defendant's transcript) asks Norma, "You keep staring at one quite a bit. Why – why do you keep going back to –

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[10] The pages of transcript attached to defendant's motion do not match the transcript from the trial. The transcript attached to defendant's motion includes several discrepancies. For example, it identifies Aguirre as "Officer Geary." "Officer Geary" asks David if he knows the true name of "Jack" rather than Jap.

to that one?" Defendant contended that Reynolds did the same in Olga's interview, saying that he "leads Olga back to the photo six-pack by means of 'I couldn't help notice you kept looking at #1' suggestive unconstitutional method."

Defendant concluded that "officers [*sic*] credibility will be a material issue in this matter. These materials will be used by defense private investigator Mr. Allard . . . to interview these witnesses."[11]

2. *Analysis*

On appeal, defendant contends that his *Pitchess* motion should have been granted because the motion asserted that "Aguirre lied and falsified police reports, and that Blagg and Reynolds exploited witnesses to obtain false identifications of [defendant] from a six-pack photographic lineup." Defendant asserts that this met the "relatively low threshold for discovery" required for a *Pitchess* motion.

A defendant seeking peace officer records "must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. ([Evid. Code.,] § 1043, subd. (b)(3).)" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019; see also Evid. Code, § 1045, subd. (a) [a defendant is entitled to records of complaints against peace officers "provided that information is

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[11] Defendant's motion also asserted that Blagg demonstrated "moral turpitude and corrupt tendencies" because, without a court order, Blagg had defendant's belongings searched for evidence and took defendant's photograph to look for gang tattoos. He does not assert this argument on appeal as a potential basis for reversal.

relevant to the subject matter involved in the pending litigation."].) "[A] showing of good cause requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick, supra*, 35 Cal.4th at p. 1021.)

For a post-trial *Pitchess* motion following a conviction, a new trial motion is the "pending litigation" to which requested records must be material. (*People v. Nguyen* (2007) 151 Cal.App.4th 1473, 1478.) Defendant asserts that "the present litigation at issue was his new trial motion based on a claim of ineffective assistance of counsel." To prevail on a claim of ineffective assistance of counsel, "defendant would have to show a 'reasonable probability' that competent performance would have led to a different result. [Citation.] Thus, the proper standard for reviewing defendant's posttrial *Pitchess* motion was whether a reasonable probability existed that disclosure of the requested records would have led to a different result at trial." (*Nguyen,* 151 Cal.App.4th at p. 1478.)

Defendant did not make this showing, and the record does not support his argument that the officers' records would bolster any assertions of ineffective assistance of counsel. Although defendant asserted that Aguirre's report differed in minor details from the transcript of David's interview, defendant's declaration did not support a suggestion that Aguirre's report was falsified. Defendant pointed to minor discrepancies between Aguirre's report and the transcript of David's interview, but the report itself referenced the videotaped interview. Because Aguirre's report made it clear that the transcribed interview itself was an

additional source of information, defendant's assertion that Aguirre attempted to hide or obscure information elicited from David in the interview is not well taken.

Regarding Blagg and Reynolds, defendant did not demonstrate that the officers committed misconduct by causing Norma and Olga to identify defendant in the six-pack. Blagg and Reynolds asked Norma and Olga in separate interviews whether they were focusing on a particular photo. Both Norma and Olga said that the person in the photograph in position number one (defendant) looked familiar. However, neither identified defendant as the shooter when looking at the six-pack. Thus defendant's assertion that Blagg and Reynolds caused Norma and Olga to identify him as the shooter was not supported by the record.

In addition, Norma did not testify, and therefore her identification of defendant as someone who looked familiar had no effect on defendant's conviction. Blagg and Reynolds played no part in interviewing the other witnesses who identified defendant in the photo six-pack within days of the shooting, so any allegation that they may have guided Norma or Olga to identify defendant has no bearing on the identification of defendant by Rosa, Maria, Geraldo, and David. Defendant therefore did not establish that the *Pitchess* materials he sought would impeach the officers' version of events.

Defendant also did not show a logical connection between the requested *Pitchess* discovery and any potential defense relating to his motion for new trial. Defendant argued generally that Aguirre, Blagg, and Reynolds may have been dishonest, but this assertion does not present an adequate basis for either *Pitchess* discovery or a new trial. A defendant may not assert

that police officers may have been dishonest "and thereby obtain discovery of all information contained in an officer's personnel records which potentially reflects on the officer's credibility." (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1024.) Even if the *Pitchess* motion were granted, any resulting evidence would not warrant a new trial where the only value of the newly discovered evidence is to impeach or contradict a witness. (*People v. Hall* (2010) 187 Cal.App.4th 282, 299.) "As a general rule, 'evidence which merely impeaches a witness is not significant enough to make a different result probable. . . .' [Citation.]" (*People v. Green* (1982) 130 Cal.App.3d 1, 11.)

Moreover, defendant did not demonstrate how the disclosure of personnel files would have any bearing on his assertion that his counsel was ineffective. In his *Pitchess* motion, defendant asserted that the records were related to his ineffective assistance of counsel claim, but he made no effort to demonstrate how the officers' personnel information would relate to that assertion. In his motion for new trial, filed three days after the court denied defendant's *Pitchess* motion, defendant argued ineffective assistance of counsel on the basis that counsel failed to do the following: call a gang expert to testify at trial, move to exclude the cup and letter found in defendant's possession, assert a "speedy trial defense due to the case being 20 years old," and poll the jury after the verdict was read. Defendant did not assert that his trial counsel was ineffective for failing to file a *Pitchess* motion before trial, nor did he allege that his counsel failed to investigate any facts related to Aguirre, Blagg, or Reynolds.

In addition, defendant has not demonstrated a reasonable probability that the outcome of the trial would have been

different if he had access to the information he sought. Even if counsel successfully undermined Aguirre's police report or Blagg's and Reynold's interview of Olga, the evidence against defendant was substantial. Olga, Rosa, Maria, and Geraldo each recounted the incident with relative consistency. David's testimony, while less clear, corroborated the basic facts recounted by the other witnesses and identified "Jap" as the perpetrator. When shown the six-pack after the shooting, Rosa, Maria, and Geraldo all immediately identified defendant as the shooter, and each of them testified at trial that they identified defendant and signed their names on copies of the six-pack. Olga identified defendant in court as the shooter. Defendant makes no effort to refute this evidence, or to demonstrate that it would have been undermined had the *Pitchess* motion been granted. "[A] defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed." (*People v. Gaines* (2009) 46 Cal.4th 172, 182.) Defendant has not made that showing here.

The trial court did not abuse its discretion in denying defendant's post-trial *Pitchess* motion.

B. Sentencing errors

The parties agree that the court made several minor sentencing errors. We discuss the errors here and direct the trial court to correct them.

1. *Section 667, subdivision (a) enhancement*

The parties agree that the court failed to impose a five-year sentence enhancement under section 667, subdivision (a)(1). Imposition of this term is mandatory. (*People v. Purata* (1996) 42 Cal.App.4th 489, 498.) "The failure to impose a five-year section

667, subdivision (a) prior serious felony conviction enhancement . . . may be corrected for the first time on appeal." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562.) We order the trial court to correct the sentence to include the section 667, subdivision (a) enhancement.

2. *Basis for sentence on count 2*

The parties agree that although the sentence on count 2 was correct, the court's articulated reasoning was erroneous. Defendant has asked us to clarify the appropriate basis for the sentence, and instruct the court to correct the abstract of judgment.

On count 2, the court sentenced defendant to 15 years to life, doubled pursuant to the Three Strikes law, with a consecutive term of ten years pursuant to section 12022.5, for a total of 40 years to life. As to the gang finding under section 186.22, the court said, "The 186.22 allegation has no effect as that only minimizes the parole eligibility period of 15 years. So that's both [*sic*] stayed as to both counts."

To clarify the basis for the court's sentence, we must first address an error in the information. The gang allegation in the information was asserted under "Penal Code section 186.22(b)(1)(4)." Similarly, the jury found true the allegation under "Penal Code Section 186.22(b)(1)(4)" for both counts. However, there is no subdivision (b)(1)(4) in section 186.22.

Both parties agree that section 186.22, subdivision (b)(5) (section 186.22(b)(5)) applies. That subdivision states that "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." This also comports with the information, which stated

that pursuant to the gang allegation, defendant would not be eligible for parole for a minimum of 15 calendar years, as well as the court's statement during sentencing that the "186.22 allegation" set parole eligibility at 15 years. We therefore agree with the parties that despite the incorrect designation in the information and on the verdict form, section 186.22(b)(5) applies here.

The sentence for attempted willful, deliberate, and premeditated murder is life with the possibility of parole. (§ 664, subd. (a).) Typically, a defendant sentenced to life with the possibility of parole must serve a term of at least seven years before becoming eligible for parole. (§ 3046, subd. (a)(1).) However, section 186.22(b)(5) "sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute." (*People v. Jefferson* (1999) 21 Cal.4th 86, 101 (*Jefferson*) [discussing former section 186.22, subdivision (b)(4), and clarifying that the 15–year minimum term is not a sentence enhancement].) Section 186.22(b)(5) therefore "establishes the punishment for the 'current felony conviction'" and is subject to sentence-doubling under the Three Strikes law. (*Ibid*.)

The parties agree that the appropriate term for count 2 was a life term with 15-years minimum parole eligibility based on the jury's finding under section 186.22(b)(5), doubled pursuant to section 667, subdivision (e)(1) to 30 years, plus 10 years for the firearm enhancement under section 12022.5. In total, therefore the sentence is 40 years to life, or a life sentence with minimum parole eligibility in 40 years.

Although defendant agrees that this was the correct term, he contends that the court stated it incorrectly. Defendant

insists that "the correct sentence for premeditated attempted murder can only be life with the possibility of parole, and that a minimum parole eligibility should be stated separately from the sentence." He insists that this is "a distinction with a difference" because defendant "believes there would be nothing preventing him from a parole hearing in less than 30 years . . . if section 186.22(b)(5) were amended." Defendant cites *Jefferson, supra,* in support of this argument, but that case contradicts his assertion. In *Jefferson*, the Court held that parole ineligibility periods in section 3046 and section 186.22 are minimum terms of confinement. (*Jefferson*, *supra*, 21 Cal.4th at p. 101.) The Supreme Court also said that "it is not improper for the trial court to include, as part of a defendant's sentence, the minimum term of confinement the defendant must serve before becoming eligible for parole." (*Id*.at p. 102 fn. 3.) That is what the court did here, and it was not improper.

3. *The "stayed" allegation under section 186.22*

After the trial court sentenced defendant on both counts, it stated that the "186.22 allegation has no effect as that only minimizes the parole eligibility period of 15 years. So that's both [*sic*] stayed as to both counts." Defendant argues that as to both counts, "the trial court erred in staying the gang enhancements under section 186.22, subdivision (b)(1) . . . because the court was required to strike the enhancements." He argues that because 10-year sentence enhancements under section 186.22, subdivision (b)(1)(C) may not be applied to an indeterminate life term (see *People v. Lopez* (2005) 34 Cal.4th 1002, 1004), "the 186.22 determinate 10-year terms on counts 1 and 2 must each be ordered stricken instead of stayed pursuant to section 654."

Section 186.22, subdivision (b)(1)(C) imposes a 10-year enhancement when a defendant commits a violent felony for the benefit of a gang. "Section 186.22(b)(1)(C) does not apply, however, where the violent felony is 'punishable by imprisonment in the state prison for life.' (Pen.Code, § 186.22, subd. (b)(5).)" (*Lopez, supra*, 34 Cal.4th at p. 1004; see also *People v. Harper* (2003) 109 Cal.App.4th 520, 525 ["if, as here, an indeterminate life term is imposed, then the 15-year minimum parole eligibility applies rather than a determinate, consecutive enhancement."].) Here, both counts carried life sentences; thus subdivision (b)(1)(C) was not applicable.

Although defendant is correct that the section 186.22, subdivision (b)(1)(C) enhancement does not apply under the circumstances of this case, the court did not in fact impose and stay separate 10-year terms pursuant to section 186.22, subdivision (b)(1)(C). Thus, there is no 10-year sentence under section 186.22 to strike.[12]

4. *Custody credits*

The court awarded defendant custody credit of "490 days actual with no conduct credit." The parties agree that defendant was entitled to 491 days actual presentence custody credit. In

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[12] The court "staying" sentences under section 186.22(b)(5) appears to have no practical effect, given that the parties agree that the court relied on section 186.22(b)(5) in sentencing defendant on count 2, and section 186.22(b)(5)'s limitation on parole is necessarily subsumed by defendant's doubled 25-years-to-life sentence on count 1. (See, e.g., *Harper, supra*, 109 Cal.App.4th at p. 527 ["the 15-year minimum parole eligibility has little effect since it is subsumed in the 25-year minimum parole eligibility imposed for the underlying murder conviction."].)

addition, the parties agree that defendant is entitled to 15 percent presentence custody credits under section 2933.1, subd. (a).[13] The parties therefore agree that defendant is entitled to 73 days presentence conduct credits.

DISPOSITION

The judgment is modified to include the five-year sentence enhancement under section 667, subdivision (a), and to award defendant 491 days of actual custody and 73 days of conduct credit for a total of 564 days of presentence credit. The trial court is directed to prepare a new abstract of judgment reflecting these changes, and in that abstract the court shall remove any reference to "PC 186.22(b)(1)(4)," and replace it with the applicable subdivision, Penal Code section 186.22(b)(5). We order the trial court to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

WILLHITE, Acting P. J. MANELLA, J.

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[13] Section 2933.2, subdivision (a) prohibits murderers from accruing credit. However, that statute became effective in 1998, and does not apply to the crimes here, which were committed in 1996. (*People v. Reyes* (2008) 165 Cal.App.4th 426, 437.)